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IN THE

SUPREME COURT OF THE UNITED STATES

April Term 79-6608

No. A-798

JAMES DEMOUCHETTE,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

DOHERTY, VELA, POSER,
SEARS and COLLINS

STANLEY G. SCHNEIDER
2225 LaBranch
Houston, Texas 77002
713/652-5711

ATTORNEYS FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

April Term

No. A-798

JAMES DEMOUCHETTE,
Petitioner

.V.

THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas, entered November 7, 1979, rehearing denied December 19, 1979.

CITATIONS TO OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals is reported at 591 S.W.2d 243 (1979) and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec.1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

QUESTION NUMBER ONE

Whether the Texas death penalty is unconstitutional pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution in that the State has failed to establish any criteria for the imposition of death sentences in order to assist juries in the determination of the special issues.

QUESTION NUMBER TWO

Whether the presentation of psychiatric testimony in the punishment phase of the petitioner's death penalty trial without the state notifying petitioner's attorney of their intent to introduce psychiatric testimony denied petitoner due process.

QUESTION NUMBER THREE

Whether petitioner's Fifth, Sixth, and Fourteenth Amendment rights were violated by the State's use of psychiatric testimony without advising petitioner of his right to remain silent and his right to counsel when examined by a psychiatrist pursuant to a Court order for the purpose of determining his compentency to stand trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Texas Law: Texas Penal Code section 12.31. Capital Felony.

> (a) An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death.
>
> (b) Prospective jurors shall beinformed that a sentence of life imprisonment or death is mandatoryon conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Texas Code of Criminal Procedure Article 37.071. Procedure in Capital Case.

> (a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be pressented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
>
> (b) On conclusion of the presentation of the evidence the court shall submit the following issues to the jury:
>
> > (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> >
> > (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals shallhave priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

STATEMENT

Petitioner was indicted in cause number 253,590 for the felony offense of capital murder whereby it was alleged that Appellant caused the death of Scott K. Sorrell while in the course of committing the offense of robbery. (Vol. I, 8). On July 5, 1977, petitioner's trial began in the 180th Judicial District Court of Harris County, Texas. On July 20, 1977, the jury found petitioner guilty of the offense of capital murder and the jury answered affirmatively each of the special issues. Notice of appeal was timely given. Petitioner's appeal was affirmed on November 7, 1979, and rehearing was denied on December 19, 1979. This Court has stayed the execution of Appellant, pending the filing of a writ of certiorari.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his brief before the Texas Court of Criminal Appeals and his rehearing application addressed to that Court, petitioner contended that the evidence was insufficient to support the jury's finding that there was a probability that he would committ criminal acts of violence that would constitute a continuing threat to society, pursuant to Art. 37.01b2. The Court of Criminal Appeals rejected this contention, confirming his conviction and sentence and denying his rehearing without comparison to other death penalty cases which the Court has rejected a jury's affirmative finding to special issue number two, i.e., Warren v. State, 562 S.W.2d 474, (Tex.Crim.App. 1978); Brasfield v. State, 61,871 (Tex.Crim.App. Feb. 13, 1980 - motion for leave to file motion for rehearing granted, April 2, 1980).

The issue heretofore stated dealing with the use of psychiatric testimony at the punishment phase of petitioner's trial was not presented to the Court of Criminal Appeals on direct appeal.[1]

It is the undersigned counsel's intention that this issue would be presented to the Court of Criminal Appeals by means of a supplemental motion for rehearing. By supplemental brief, it is the undersigned counsel's intention of notifying the Court of Criminal Appeals determination of this issue. It is the intention of the undersigned attorney to present this issue in the manner in which the record reflects it, and asks the Court to consider the same pursuant to the granting of certiorari in Estelle v. Smith, supra.

[1]The undersigned counsel was contacted by the American Civil Liberties Union on or about May 1, 1980, in regard to assisting them in the preparation of petitioner's writ of certiorari. Petitioner's prior attorney could not continue to represent petitioner. Upon examination of the record, this issue, which is currently before the Court in Estelle v. Smith, 48 U.S. Law Week 3602 (March 17, 1980).

REASONS FOR GRANTING THE WRIT

REASON NUMBER ONE

This Court should grant certiorari to determine whether the Texas death penalty procedure is unconstitutional pursuant to the Fifth, Sixth and Fourteenth Amendments of the United States Constitution in that the State has failed to establish any criteria for the imposition of the death sentence. This Court noted in Jurek v. Texas, 428 U.S. 262, 276; 29 L.ed2d 929, 96 S.Ct. 2950, (1976) in upholding the constitutionality of the Texas death penalty procedure that in Texas, by its narrow definition of capital murder, the jury must find at least one statutory aggravating circumstance before a death sentence may be considered. Further, this Court found that Texas has insured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. Additionally, this Court held that "by providing prompt judicial review of the jury's decision in a Court of state-wide jurisdiction, Texas has provided a means to promote that the even handed, rational, consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be wantonly or frequently imposed, it does not violate the Constitution. Petitioner asserts that, on the contrary, the Texas Court of Criminal Appeals has not applied its standard in that "even handed, rational and consistent" manner. In the case at bar, there was no showing of past violent behavior by the petitioner. The only evidence presented in the punishment phase was that he had two (2) prior non-violent convictions. The Court of Criminal Appeals, in one case, found that there was insufficient evidence to support the jury's affirmative findings in regard to question number two because there was no evidence to show that any violence was connected with Appellant's criminal record. See Warren v. State, 562 S.W.2d 474, (Tex.Crim.App. 1978). In Brasfield v. State, 61,871, rehearing granted, April 2, 1980, the Court of

Criminal Appeals set aside a death sentence in another case where there were gruesome facts presented. The inconsistency found in the Court between Warren, Brasfield, and the case at bar, clearly demonstrates that the basic assumption upholding the constitutionality of the Texas death penalty procedure has not been fulfilled by the Court of Criminal Appeals. Thereby, this Court should hold that the Texas death penalty procedure is unconstitutional and set aside petitioner's conviction.

REASON NUMBER TWO AND THREE

This Court should grant certiorari to consider whether petitoner was denied due process by the State's failure to notify his attorney of its intention to present psychiatric testimony at the punishment phase of petitioner's capital murder trial to controvert the testimony of the State's psychiatrist that petitioner would constitute a continuing threat to society in the future.

This Court should also grant certiorari to consider whether petitioner's Fifth and Fourteenth Amendment rights to remain silent and his right to attorney were violated by the testimony of the psychiatrist testifying at the punishment phase of his capital murder trial without having been advised that his interview with the psychiatrist would and could be used against him to support this state in its attempt to seek the death penalty.

These issues are presently before the Court in Estelle v. Smith, 602 Fed.2d 604, (5th Circ. 1979), 48 U.S. Law Week 3602, March 17, 1980, wherein petitioner Smith's Texas death sentence was reversed by the Fifth Circuit.

The record reflects that on October 24, 1976, the Honorable Fred M. Hooey, Judge 180th District Court of Harris County, Texas, granted a motion for psychiatric examination filed by an Assistant District Attorney and petitioner's attorney, J. R. Musslewhite. Pursuant to the Court's order, petitioner was examined by John D. Nottingham, M.D., (Vol. I. 15) who determined that petitioner was sane at the time of the

offense and competent to stand trial. Petitioner was also examined by Jerome B. Brown, P.H.D., Clinical Psychologist who also determined that he was sane and competent to stand trial. During the punishment phase of petitioner's capital murder trial, Dr. Brown testified that in his opinion, Appellant would constitute a continuing threat to society and would probablycommit future acts of violence. (Vol. V 1741) The record reflects that no evidence was presented by the defense at either the innocent phase or the punishment phase of the petitioner's trial. The record does not indicate whether or not petitioner's attorneys were notified, prior to trial, of the State's intent to introduce psychiatric tests; however, it is unmistaken that there are many noted psychiatrists and psychologists who note that psychiatrists cannot properly determine and predict whether or not an individual will commit future acts of violence. Further, there is also no indication anywhere in the record that Petitioner was advised that the matters ascertained by the doctors during their examinations cculd be used against him during the punishment phase of his trial.

Thus petitioner asserts that this Court's action in Smith v. Estelle, will be dispositive of this issue.

CONCLUSION

Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

DOHERTY, VELA, POSER,
MARS and COLLINS

STANLEY G. SCHNEIDER
2225 LaBranch
Houston, Texas 77002
713/652-5711

Dated: Houston, Texas
May 10, 1980

APPENDIX A

JAMES DEMOUCHETTE, Appellant
NO. 61,160 v. - - -
THE STATE OF TEXAS, Appellee

79-6608

Appeal from HARRIS County

OPINION

This is an appeal from a conviction for capital murder. The jury answered affirmatively the special issues submitted pursuant to Article 37.071, Vernon's Ann.C.C.P., and, accordingly, punishment was assessed at death.

The sufficiency of the evidence to sustain appellant's conviction for the robbery-murder is not challenged. On October 18, 1976, Jeoffrey Hambrick was the manager of a Pizza Hut restaurant in Houston. Around midnight, about closing time, appellant and his brother Chris entered the Pizza Hut, and Chris ordered a beer. The two then went and sat down in a rear booth. Shortly thereafter, Scott Sorrells, the deceased, and his roommate, Robert White, entered the Pizza Hut. Scott, who was an employee there, was to have met Hambrick at closing time, in order to learn how to do the bookkeeping. Hambrick, Scott and Robert sat down together in the front of the restaurant. Scott was acquainted with Chris Demouchette, so he asked Chris and appellant to join the others at the front. Appellant and his brother did so, and the five sat together for a short time, "making small talk." Hambrick testified that appellant and his brother were trying to get him to give them a free pizza, which Hambrick did not want to do. He testified that he was trying to stall them until 12:30 a.m., when he could ask them to leave, but that he was getting nervous about turning them down.

Hambrick testified that two conversations were going on at the table, when he heard Robert White say, "I would think twice before I pulled that trigger." He looked up and saw appellant,

with his arm extended about a foot from Robert, and saw him shoot Robert in the face. Robert fell forward onto the table. Hambrick was still turning his head when appellant pointed the gun at him and fired. The shot hit him in the head and knocked him back against the booth. He then fell forward on the table. Immediately thereafter, Hambrick heard another shot and realized that Scott had been shot, too. Hambrick laid still and played dead. After Scott was shot, Hambrick heard the pair's footsteps in the back room area, and heard them rummaging around. Then the two came back out to the front, and he heard one say "Get the keys." He then heard footsteps coming toward where he was lying.

Hambrick testified that Scott was still alive, because he could hear his labored breathing and a gurgling in his throat. When the footsteps reached the area, Hambrick heard another shot and Scott fell forward on the table, breaking it. Hambrick then heard the click of the gun, but no shot fired. After he heard the click, he felt himself being picked up off the table and his keys were removed from his pocket. He heard the keys jangling and someone state, "Out the back door, Chris." The two then left the restaurant. After waiting for a while, Hambrick got up and called the police.

The police arrived and found Scott dead and Hambrick wounded. Robert died shortly after reaching the hospital. It was later determined that money from the cash register and a stereo receiver were taken from the Pizza Hut. Other evidence was introduced to substantiate appellant's guilt of the murders.

In his first ground of error, appellant contends that the trial court abused its discretion in overruling his motion for a change of venue. The record reflects that a hearing was held on appellant's motion, during which he offered testimony by inmates in the Harris County Rehabilitation Center that he could not

receive a fair and impartial trial in Harris County. The State offered rubuttal evidence that appellant could receive a fair and impartial trial in that county. After hearing this evidence, the trial court overruled appellant's motion.

We are cognizant that the question of whether a change of venue should be granted because of prejudicial publicity is one of constitutional dimension and that the test to be applied by the court is whether outside influences affecting the community's climate of opinion as to a defendant are so inherently suspect that the resulting probability of unfairness requires suitable procedural safeguards. See Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); Shepherd v. Maxwell, 383 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); see also, Murphy v. Florida, 421 U.S 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962).

An examination of the exhibits introduced at the hearing indicates that the information contained in the news reports was accurate and was apparently placed there for the purpose of informing the public of current events. See Bell v. State, 582 S.W.2d 800 (Tex.Cr.App. 1979); Adami v. State, 524 S.W.2d 693 (Tex.Cr.App. 1975); Morris v. State, 488 S.W.2d 768 (Tex.Cr.App. 1973); Taylor v. State, 420 S.W.2d 601 (Tex.Cr.App. 1967). Further, the publicity concerning this crime was by no means substantial. The testimony that appellant could not receive a fair and impartial trial in Harris County was contradicted by testimony presented by the State.

In the instant case, the trial court was presented with conflicting testimony with respect to whether appellant could obtain a fair trial in the local community because of pretrial publicity. This issue was decided adversely to appellant's

contentions when the trial judge, as the trier of facts, overruled the motion for a change of venue. Bell v. State, supra; Von Byrd v. State, 569 S.W.2d 883 (Tex.Cr.App. 1978); Freeman v. State, 556 S.W.2d 287 (Tex.Cr.App. 1977); Ransonnette v. State, 522 S.W.2d 509 (Tex.Cr.App. 1975). We hold that the trial court did not abuse its discretion in overruling appellant's motion. This ground of error is overruled.

In his second ground of error, appellant attacks the sufficiency of his indictment for capital murder, contending that it was defective for its failure to allege the constituent elements of the offense of robbery. We have previously held that a capital murder indictment is not defective because the elements of robbery are not set out in the indictment charging murder during the commission or attempted commission of robbery. Hammett v. State, 578 S.W.2d 699 (Tex.Cr.App. 1979); Livingston v. State, 542 S.W.2d 655 (Tex.Cr.App. 1976); see Granviel v. State, 552 S.W.2d 107 (Tex.Cr.App. 1976). Under the new Penal Code, an indictment charging one offense during the commission of another crime need not allege the elements of the latter offense. See Gonzales v. State, 517 S.W.2d 785 (Tex.Cr.App. 1975); Watts v. State, 516 S.W.2d 414 (Tex.Cr.App. 1974). This ground of error is overruled.

In his third ground of error, appellant contends that the in-court identification of him by witnesses Jeoffrey Hambrick and Billy Harper was tainted by impermissibly suggestive photographic arrays. The trial court held a hearing out of the presence of the jury on the admissibility of the in-court identification.

The record reflects that at about 3-4 p.m. on the afternoon after the offense, Officer Tom Klawiter took five photographs to Hambrick in the hospital. At this time, appellant's picture had not been published or televised. The pictures were handed

to Hambrick, and he picked appellant's picture out of the group. All were pictures of black males. There was some conflicting evidence about whether the names were on the backs of the photographs, but Officer Klawiter testified that appellant's name was not on the back of his picture. He further testified that Hambrick had not seen any names on the backs of the photographs before he made his identification of appellant. At trial, Hambrick testified that immediately prior to the shootings, he had observed appellant in the Pizza Hut for about twenty minutes, and that he had engaged in a brief conversation with him. He further stated that the photographic array he had observed was not suggestive, but that his identification of appellant was based upon his observing appellant at the time of the offense. The trial court ruled that Hambrick's identification of appellant was of independent origin, based upon his observations of appellant at the time and place of the offense under normal lighting, and that his subsequent in-court identification was not tainted.

Witness Billy Harper testified that he had observed appellant and his brother enter the Pizza Hut a few minutes before closing. He testified that the lighting was good in the restaurant, and he was in appellant's presence for approximately five minutes, and that his in-court identification of appellant was based on his observations at that time. Officer D. L. Moorman testified that he took a statement from Harper on the day following the murders. At that time, he showed Harper five pictures. From that group, Harper identified appellant and his brother as the two he had seen on the night of the offense. The photographs, introduced into evidence outside the jury's presence, had plates under the faces of the suspects, on which appeared a number, and in small letters, a date. Appellant contends that this photographic array was impermissibly suggestive because only the pictures of appellant and his brother had the date of "October 18" on the plates. However, Harper testified that he did not recall any numbers on the pictures when he saw them, and

reiterated that his identification was based upon his observation of appellant at the Pizza Hut.

We find ample evidence to support the trial court's finding that Hambrick's and Harper's identifications of appellant were based upon their independent views of appellant and not based upon either photographic display. Thus, the in-court identification of appellant by these witnesses was clearly admissible. Komurke v. State, 562 S.W.2d 230 (Tex.Cr.App. 1978); Bermudez v. State, 533 S.W.2d 806 (Tex.Cr.App. 1976); Clay v. State, 518 S.W.2d 550 (Tex.Cr.App. 1975); Thompson v. State, 480 S.W.2d 624 (Tex.Cr. App. 1972). Further, we find from our examination of the record that the photographic arrays were not suggestive. This ground of error is overruled.

In his fourth ground of error, appellant contends that the evidence is insufficient to support the jury's finding that there is a probability that appellant would commit criminal acts of violence that would constitute a continuing threat to society. ticle 37.071(b)(2), Vernon's Ann.C.C.P.

At the punishment phase of the trial, the State introduced into evidence appellant's two prior convictions, one for theft and one for burglary. The State then presented the testimony of John Womack, Assistant Warden at the Clemons Unit of the Texas Department of Corrections, who testified that appellant's reputation for being a peaceful, law-abiding citizen was bad. Howard Mitchell, Assistant Warden at the Darrington Unit of the Texas Department of Corrections, also testified that appellant's reputation for being a peaceful, law-abiding citizen was bad. Further, Paul Jacka, Warden at the Jester Unit of the Texas Department of Corrections, similarly testified as to appellant's bad reputation. Senior Lieutenant Robert Killbuck of the Harris County Sheriff's Department also testified that appellant's reputation for being a peaceful, law-abiding citizen was bad.

Appellant presented no evidence in mitigation of punishment.

It is well settled that in assessing punishment, the jury may consider all of the evidence adduced at trial on guilt or innocence. O'Bryan v. State, ___ S.W.2d ___ (Tex.Cr.App., delivered September 26, 1979); Duffy v. State, 567 S.W.2d 197 (Tex.Cr.App. 1978); Felder v. State, 564 S.W.2d 776 (Tex.Cr.App. 1978); Brock v. State, 556 S.W.2d 309 (Tex.Cr.App. 1977); Shippy v. State, 556 S.W.2d 246 (Tex.Cr.App. 1977); Moore v. State, 542 S.W.2d 664 (Tex.Cr.App. 1976). The calculated nature of a defendant's acts and the forethought with which he executed his crime is certainly probative evidence of his propensity to commit future acts of violence. See O'Bryan v. State, supra; Brooks v. State, ___ S.W.2d ___ (Tex.Cr.App., delivered March 21, 1979); Earvin v. State, 582 S.W.2d 794 (Tex.Cr.App. 1979); Felder v. State, supra; Duffy v. State, supra; cf. Warren v. State, 562 S.W.2d 474 (Tex.Cr.App. 1978).

In the instant case, appellant went to the Pizza Hut armed. The fact that he went armed is of probative value. See Duffy v. State, supra; Felder v. State, supra. Inside, he waited until all the persons inside the restaurant were together, and then shot each in rapid succession from close range. He and his brother then ransacked the office and took money and stereo equipment. Upon discovering that one of the victims was still alive, he shot him a second time. Apparently, he tried to shoot another of the victims again, but the gun did not fire. Appellant obviously intended to kill all three of the men, but succeeded in only killing two and seriously injuring the third. The fact that even after committing the robbery, he obviously intended to kill all witnesses to the robbery is certainly probative evidence.

There was no evidence that appellant was under the influence or domination of anyone else; we have previously stated that this is probative evidence on special issue number two. O'Bryan v.

State, supra; Earvin v. State, 582 S.W.2d 794 (Tex.Cr.App. 1979); Duffy v. State, supra; Hovila v. State, 562 S.W.2d 243 (Tex. Cr.App. 1978); Robinson v. State, 548 S.W.2d 63 (Tex.Cr.App. 1977); Jurek v. State, 522 S.W.2d 934 (Tex.Cr.App. 1975). There is no evidence that appellant was under mental or emotional pressure which might mitigate his actions; the presence or absence of such pressure is also probative evidence. O'Bryan v. State, supra; Earvin v. State, supra; Duffy v. State, supra; Hovila v. State, supra; Robinson v. State, supra; Jurek v. State, supra.

The evidence also reflects that appellant had two prior felony convictions. Although none of his prior offenses involved violence against persons, they were nevertheless probative of appellant's propensity to commit criminal acts. See Starvaggi v. State, ___ S.W.2d ___ (Tex.Cr.App., delivered June 6, 1979); Duffy v. State, supra; Felder v. State, supra.

The State also offered evidence that appellant's reputation for being a peaceful, law-abiding citizen was bad. The jury may have concluded that the testimony of three wardens from the Texas Department of Corrections was particularly probative of the special issues which would determine whether appellant would be sentenced to life imprisonment or death.

Thus, on the record before this Court, it appears that appellant's entire conduct exhibited a wanton and callous disregard for human life; the jury was justified in finding that the aggravating factors outweighed any mitigating factors, and the evidence is sufficient to support their finding that there is a probability that this appellant would constitute a threat to society. See Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2956, 49 L.Ed.2d 929 (1976). See and compare O'Bryan v. State, supra; McMahon v. State, 582 S.W.2d 786 (Tex.Cr.App. 1978); Brooks v. State, supra; Earvin v. State, supra; Starvaggi v. State, supra;

Villarreal v. State, 576 S.W.2d 51 (Tex.Cr.App. 1978); Muniz v. State, 573 S.W.2d 792 (Tex.Cr.App. 1978); Adams v. State, 577 S.W.2d 717 (Tex.Cr.App. 1979); Bodde v. State, 568 S.W.2d 344 (Tex.Cr.App. 1978); Von Byrd v. State, supra; Duffy v. State, supra; Felder v. State, supra; Brock v. State, 556 S.W.2d 309 (Tex.Cr.App. 1977); Shippy v. State, supra; Granviel v. State, supra; Moore v. State, supra. This ground of error is overruled.

The judgment is affirmed.

W. C. DAVIS, Judge

(Delivered November 7, 1979)

En Banc

APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas, DEC 19 1979

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave To File" the Appellant's Motion for Rehearing in Cause No. 61,160, JAMES DEMOUCHETTE

Motion to Stay Mandate Granted for 30 days

vs. THE STATE OF TEXAS Appellee.

Sincerely yours,

~~GLENN HAYNES~~ THOMAS LOWE, Clerk

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

April Term

79-6608

JAMES DEMOUCHETTE, Petitioner	X X	
V.	X	No. A-798
THE STATE OF TEXAS, Respondent	X X	

PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

NOW COMES JAMES DEMOUCHETTE, by and through his attorney, STANLEY G. SCHNEIDER, and would show the Court that JAMES DEMOUCHETTE is totally indigent and is unable to pay filing fees for the filing of his application for writ of certiorari. To the best of the undersigned attorney's knowledge Petitioner has no funds with which to pay said fees in this cause, due to his incarceration. The Petitioner has filed Pauper's Affidavit at the trial level and state appellate level. A Pauper's Affidavit will be forthcoming from Petitioner.

Respectfully submitted,

DOHERTY, VELA, POSER,
SEARS and COLLINS

STANLEY G. SCHNEIDER
2225 LaBranch
Houston, Texas 77002
713/652-5711

SUBSCRIBED AND SWORN TO BEFORE ME on this the 15th day of May, 1980.

NOTARY PUBLIC IN AND FOR
HARRIS COUNTY, T E X A S

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above statement has been mailed to Anita Ashton, Assistant Attorney General, Attorney General's Office, Austin, Texas, 78710, Certified, Return Receipt Requested, with sufficient postage affixed thereto on the 15th day of May, 1980.

STANLEY G. SCHNEIDER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-6608

* * *

JAMES DEMOUCHETTE,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

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SUPREME COURT, U.S.

ORIGINAL COPY

* * *

On Petition For Writ Of Certiorari
To The Texas Court of Criminal Appeals

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas, Respondent in the above entitled and numbered cause, and by and through its attorney of record, the Attorney General of Texas, Mark White, files this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as Demouchette v. State, 591 S.W.2d 488 (Tex. Crim.App. 1979).

JURISDICTION

Petitioner is seeking to invoke the jurisdiction of this Court pursuant to the provisions of 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. Whether the Texas Death Penalty Statute is unconstitutional pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution in that the State has failed to establish any criteria for the imposition of death sentences.

II. Whether the presentation of psychiatric testimony in the punishment phase of Petitioner's trial without the State notifying Petitioner's attorney of their intent to introduce psychiatric testimony denied Petitioner due process.

III. Whether Petitioner's Fifth, Sixth, and Fourteenth Amendment rights were violated by the State's use of psychiatric testimony without advising Petitioner of his right to remain silent and his right counsel.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. UNITED STATES CONST., AMEND. V.
2. UNITED STATES CONST., AMEND. VI.
3. UNITED STATES CONST., AMEND. VIII.
4. UNITED STATES CONST., AMEND. XIV.

STATEMENT OF THE CASE

Petitioner was indicted by the Grand Jury of Harris County, Texas, for the offense of murder of Scott K. Sorrells, during the course of committing robbery on or about October 18, 1976. Petitioner was appointed counsel to represent him. A psychiatric examination was performed on Petitioner. Jury selection began, after denial of a Motion for Change of Venue, on July 6, 1977. On July 18, 1977, Petitioner entered a plea of not guilty to the indictment and testimony began. On July 20, 1977, Petitioner was found guilty by the jury of capital murder as charged in the indictment. That afternoon the punishment phase of the trial began. Late that afternoon, the jury returned a verdict of yes to Special Issue No. 1 and Special Issue No. 2 which resulted in a sentence of death. Petitioner appealed his conviction to the Texas Court of Criminal Appeals where it was affirmed in a unanimous decision on November 7, 1979. Motion for Leave to File Petitioner's Motion for Rehearing was denied on December 19, 1979. It is from that opinion that this petition for writ of certiorari is taken.

The evidence presented at Petitioner's trial showed that Petitioner and his brother, Chris Demouchette, entered a Pizza

Hut Restaurant in Houston, Texas, on October 18, 1976. After placing an order, they sat down in a rear booth. Shortly thereafter, the deceased, Scott Sorrells, and his roommate, Robert White, who was also murdered, entered the Pizza Hut. Scott was an employee there and was to have met the manager, Jeoffrey Hambrick, in order to learn bookkeeping. Hambrick, Sorrells and White sat down together in the front of the restaurant. Petitioner and his brother joined the other three; then Petitioner pulled a gun on Robert White and shot him in the face. Petitioner next shot Hambrick and Sorrells in the head. Sorrells and Hambrick were still alive. Petitioner and his brother returned to the table after rummaging around in the rear of the restaurant and shot Sorrells a second time. Hambrick then heard the click of a gun as it misfired. The keys were removed from Hambrick's pocket and the two Demouchette brothers left the store. Hambrick called the police, who found Scott dead and White and Hambrick wounded. White died shortly after reaching the hospital. Money and a stereo receiver had been taken from the Pizza Hut. Hambrick identified the two Demouchette brothers as the perpetrators of the crime and identified Petitioner as the trigger man. Petitioner was also identified by Billy Harper, who had been a customer in the Pizza Hut shortly before the shooting. No defensive evidence was presented. At the punishment stage of the trial, evidence was introduced as to Petitioner's two prior felony convictions, his bad reputation in the community, and hypothetical testimony from a psychologist as to the characteristics of a psychopathic personality.

ARGUMENT AND AUTHORITIES

I.

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JURY'S FINDING THAT A DEATH SENTENCE SHOULD BE IMPOSED.

Petitioner has alleged in his application for writ of certiorari that the Texas Capital Murder Statute is unconstitutional in that it has failed to establish any criteria for the imposition of death sentences in order to assist juries

in the determination of the special issues. This issue was not presented to the Texas Court of Criminal Appeals on direct appeal. Therefore, it cannot be considered now. Tacon v. Arizona, 410 U.S. 351 (1973); Cardinale v. Louisiana, 394 U.S. 437 (1969). However, a similar issue as to insufficiency of the evidence to support the jury's finding was presented. In evaluating Petitioner's case, the Texas court found that the evidence showed beyond a reasonable doubt that Petitioner and his brother committed a brutal robbery-murder in which two people were murdered and a third seriously injured. The crime was committed in a cold and calculating manner. The State introduced evidence of two prior felony convictions, one for theft and one for burglary. The State also presented testimony of John Womack, Assistant Warden at the Clemons Unit of the Texas Department of Corrections, Howard Mitchell, Assistant Warden at the Darrington Unit of the Texas Department of Corrections, Paul Jacka, Warden of the Jester Unit of the Texas Department of Corrections, and Robert Killbuck, Senior Lieutenant of the Harris County Sheriff's Department, who all testified that Petitioner's reputation for being a peaceful and law-abiding citizen in the community was bad.

The court went on to determine that the calculated nature of the acts were probative evidence of the propensity to commit future acts of violence. In making this determination, the court cited cases in which the court had upheld the death sentence and contrasted a case in which the court had reversed the death sentence for insufficient evidence to prove that element. The court also found there was no evidence to show that Petitioner was under the influence or domination of anyone else. The court made a careful assessment of the evidence in Petitioner's case and found it sufficient to support the jury's verdict.

II.

THE PRESENTATION OF PSYCHIATRIC TESTIMONY ON HYPOTHETICAL QUESTIONS IS NOT PROPERLY BEFORE THIS COURT FOR REVIEW.

Petitioner, in his Petition for Certiorari, asks this Court to consider the use of psychiatric testimony during

the punishment phase of his trial. This question is not properly before this Court for review on petition for writ of certiorari. No question was ever raised in the Texas Court of Criminal Appeals concerning the use of the psychiatric testimony during Petitioner's trial. Petitioner's attorney states that he is going to file an out-of-time Motion for Rehearing in the Texas Court of Criminal Appeals. There is no Texas procedure to provide for this. Further, the Texas Court of Criminal Appeals will not consider any pleading even if there was a procedure to provide for such pleading, while a case is being considered by this Court. Houston Chronicle Publishing Co. v. McMaster, ___ S.W.2d ___ (Tex.Crim.App. No. 64,751 delivered May 14, 1980); see also Harris County Commissioner's Court v. Moore, 420 U.S. 77 (1975); Palmer v. Jackson, ___ F.2d ___ (5th Cir. No. 78-2716, delivered May 19, 1980).

Further, no objection was made at trial on the grounds now brought forward. Absent a correct contemporaneous objection, there is nothing presented for review. Boulware v. State, 542 S.W.2d 677 (Tex.Crim.App. 1976), cert. denied, 430 U.S. 959 (1977); Wainwright v. Sykes, 433 U.S. 72 (1977).

Petitioner's allegations in regard to the psychiatric testimony are inapposite to the facts in Estelle v. Smith, No. 79-1127, cert. granted March 17, 1980. In Petitioner's case, his attorney was well aware of the examinations by the psychiatrist and the psychologist at the Harris County Forensic Psychiatry Unit. Petitioner's counsel signed the Motion for Psychiatric Examination. The psychologist who testified at Petitioner's trial, Jerome Brown, testified that he made an examination of the Petitioner. (S/F 1737). An objection was sustained when the State asked the psychologist for his evaluation of Petitioner's personality. (S/F 1738). The psychologist then testified as to the general characteristics of a psychopathic personality. (S/F 1739). The witness was next asked a hypothetical question

and stated that in his opinion, a person such as the one described in the hypothetical situation, would probably commit future acts of violence. (S/F 1741). The witness never testified as to the evaluation performed on James Demouchette or as to whether he believed that James Demouchette himself would commit future acts of criminal violence.

Since Petitioner has never presented these allegations to the Texas Court of Criminal Appeals, certiorari is improper as to questions II and III. There is no evidence in the record to support Petitioner's allegations as to the manner in which the testimony was used. Further, since the witness testified only as to hypothetical situations, not as to an evaluation on Petitioner, the testimony is completely dissimilar to the testimony in Estelle v. Smith, supra, and would not be affected by this Court's opinion in Estelle v. Smith.

CONCLUSION

For the foregoing reasons, Respondent respectfully prays that certiorari be denied.

Respectfully submitted,

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